IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2559 OF 2003.
IN
SUIT NO. 2728 OF 2003

Anant B. Chaudhari.] .. Plaintiff

Versus

1. Municipal Corpn. of Gr.Mumbai & Anr.] .. Defendants

Mr.Shyam A. Diwan i/b Yadunath Chaudhari for plaintiff.

Mr. K.N. Gaikwad for defendant No.1.

Mr.Girish Desai i/b Priti S. Shah for defendant No.2.

CORAM: ANOOP V. MOHTA, J.

DATED: 14TH SEPTEMBER, 2005

P.C. :

1. A Notice of Motion has been taken out by the plaintiff and prayed for following reliefs:

> "(a) That pending the hearing and final disposal of the Suit, the Defendants, their agents, servants, representatives and/or any person or persons claiming through or under them, be restrained by an Order of temporary injunction of this Hon'ble Court from in any manner transferring, alloting and/or parting with possession of one flat admeasuring 225 sq.ft. in the building known as "Trio Arch" constructed by the Defendant No.2 on the plot of land bearing CTS No.A/752, Bandra Village, Ice Factory Lane, Bandra

(West), Mumbai 400050 to any third party other than the Plaintiff;

(b) that pending the hearing and final disposal of the Suit, the Court Receiver, High Court, Bombay, be appointed as a Receiver in respect of one flat admeasuring 225 sq.ft. in the building known as "Trio Arch" constructed by the Defendant No.2 on the plot of land bearing CTS No.A/752, Bandra Village, Ice Factory Lane, Bandra (West), Mumbai 400050, and the Plaintiff be appointed as agent of the Court Receiver without payment of any royalty or security;"

2. After considering the averments made in the Plaint, as well as in the Affidavit in support of the Notice of Motion and after hearing both the parties, by an order dated 8th September, 2003, prayer clauses (a) in respect of flat No.5 as per occupation plan has been granted pending the final disposal of the Motion. By a further order dated 30th August, 2004, after hearing both the parties again, based on subsequent events, a relief in terms of prayer clause (b) has been granted. The averments made in the Affidavit in support of the Notice of Motion remained uncontroverted by both the defendants. The orders dated 8th September, 2003, and 30th September, 2004, also remained intact and the ad-interim reliefs, therefore, have been in operation since then.

3. The plaintiff herein, by this Suit, prayed for declaration of his entitlement for one flat of an area of 225 sq.ft. on ownership basis in the building known as Trio Arch constructed by defendant No.2 as per letter of allotment dated 25th May, 2000, and seeks possession of the said flat. Defendant No.1, the Municipal Corporation of Greater Mumbai, as per the Policy of the Corporation to allot alternative tenements, by a letter of allotment dated 25th May, 2000, allotted a flat admeasuring about 225 sq.ft. at Trio Arch at Bandra West. Plaintiff was occupying a structure prior to 1995, alongwith one Kirit Rama Soneki on the plot which was acquired by defendant No.1 for the purpose of construction of a building. Therefore, the above alternative tenements have been allotted to plaintiff as per the Policy. Plaintiff, therefore, made the requisite part-payments towards the construction cost. As per plaintiff, defendant No.2 was liable to hand over 10% of the constructed flats to defendant No.1 to enable them to allot the same to the Project Affected persons. The suit flat has been also handed over by defendant No.1 to defendant No.2. Defendant No.1-Corporation, therefore, by a letter dated 29th May, 2000, directed defendant No.2 to execute the Sale Deed and to hand over possession of the flat to the plaintiff. The plaintiff was also directed to take the possession of the said

flat from defendant No.2. As defendant No.2 refused to hand over the possession of the flat in question inspite of the instruction and letter of defendant No.1, the present suit came to be filed by the plaintiff on 6th August, 2003, through his Constituted Attorney. As alleged and observed, there was some dispute between defendant Nos.1 and 2 with regard to payment of the cost of the flat. As defendant No.2 failed to execute the necessary documents and hand over possession inspite of the Advocate's letter dated 28th June, 2002, in the present Suit, the Notice of Motion has been taken out by the plaintiff and prayed for reliefs as reproduced above.

4. Defendant No.1, in fact, has supported the plaintiff's case during the course of arguments also. However, Mr. Girish Desai, learned counsel for defendant No.2 contended that defendant No.1, in collusion with plaintiff, acted contrary to the Policy in question. He further contended that since defendant No.1 was in collusion with plaintiff, therefore, plaintiff is not entitled for any right over the said flat. The allegations of fraud and collusion are not supported by any Affidavit or particulars. The uncontroverted position on the record remained unchanged till this date of final hearing of this Notice of

Motion. The contention of defendant No.2, therefore, at this stage for want of supporting Affidavit in reply and/or the particulars in support of the allegation of fraud and collusion, is difficult to be accepted for the purpose of dismissing the Notice of Motion and/or the prayers as have been granted by this Court, after hearing both the parties, even though at the ad-interim stage.

5. The learned counsel for defendant No.2 also raised a contention that the verification made in the present Suit by the Constituted Attorney and not by the plaintiff himself. He also tried to agitate the issue about the illegality committed by the defendant No.1-Corporation in issuing the letter of allotment in favour of the plaintiff. As noted, all these contentions, as raised by defendant No.2, have not been supported or agitated by defendant No.1. The learned counsel appearing for plaintiff submitted that all these arguments cannot be considered at this stage without any supporting evidence or material and specially without any counter Affidavit to the averments already made in the Plaint, as well as, supporting Affidavit to the Notice of Motion. They had already been raised and agitated during the hearing when the earlier ad-interim orders was passed. All these submissions, therefore, as

rightly contended by the counsel for plaintiff need to be considered at the final stage. These contentions, therefore, as raised by defendant No.2 are rejected for want of supporting material and particulars.

6. By an ad-interim order dated 30th August, 2004, while granting the ad-interim relief in terms of prayer clause (b), the learned Judge has taken note of all subsequent events supporting the case of plaintiff. Defendant No.1 also has supported the case of plaintiff. The plaintiff has paid the requisite amount as per letter of allotment towards the construction cost. The plaintiff has complied with the basic formalities. The plaintiff has already lost his premises in the Road Widening Scheme. The suit flat, even though it is ready, is locked. As observed in order dated 30th August, 2004, defendant No.2 has already handed over the key of the said flat to the Corporation on 7th July, 1999. The question regarding payment of additional amount, if any, is the dispute between defendant No.1-Corporation and defendant No.2-builder. The plaintiff, therefore, has complied with the terms and conditions and has made the requisite payments and as in this background, prayer clause (b) has been in operation since 30th August, 2004, I see there is no sufficient

reason made out to interfere with the said reasoned order dated 30th August, 2004 and/or order dated 8th September, 2004, the reference to which has been made in the order dated 30th August, 2004.

7. Taking all this into account, I am inclined to confirm the order dated 30th August, 2004, passed in the present Notice of Motion in terms of prayer clauses (a) and (b). Notice of Motion is accordingly disposed of.

[ANOOP V. MOHTA, J.]

[srpasha@hc]